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IN THE SUPREME COURT OF THE UNITED STATES

LESLIE C. CASE, Plaintiff-Appellant-Petitioner,

v.

BASF WYANDOTTE CORP. (A corporation of Michigan), and NATIONAL GYPSUM COMPANY (A corporation of Delaware),

Co-Defendant-Appellee-Respondents.

PETITION FOR WRIT OF CERTIORARI

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September 14, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Do not the Constitution, and the prior decisions of this Court, mandate that a patentee engaged in a patent infringement suit receive a fair trial and a decision in accordance with the merits, and with precedent?

2. Do not the Constitution, and the prior decisions of this Court, require that notice of the district court's decision in a patent suit be given to the patentee, especially where the trial was not conducted in accordance with the due process requirement?

3. Is it not a misconstruction of Rule 77(d), F. R. Civ. P., that it should serve as a vehicle to prevent an appeal as a matter of right of a district court decision rendered contrary to rule and precedent?

4. How disorderly must judicial conduct in the lower courts become, before this Court exercises its supervisory powers?

5. Will this Court act to return the patent system to its constitutional basis and legislative intent?

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REFERENCES TO REPORTS BELOW

At the time of submission of this petition, the petitioner is aware of only the report regarding the decision regarding venue. That decision and report are not in controversy, and therefore of no note here.

Petitioner is not aware that the orders of either the district court or the court of appeals has been published.

STATEMENT OF GROUNDS FOR JURISDICTION

(i) The order of the Court of Appeals, Federal Circuit, was dated On July 3,1984.

(iv) This Court has jurisdiction to review the order in question under 28 USC 1254(1).

This Court also has jurisdiction to issue a writ of error under the court of appeals act:

> "and (otherwise unappealable) cases in which is involved a deprivation of constitutional rights may be brought to this court by writ of error under Par. 5 of the court of appeals act"
> Heike v. U.S. 217 U.S. 423,428 (1910)

> "in such case (of constitutional question) the statute grants to this court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question."
> Burton v. U.S. 196 U.S. 283,295 (1905)

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

1. Article I, Section 8 of the United States Constitution (Commerce Clause)

2. Amendment 5 to the United States Constitution.

3. 35 United States Code, 154(Contents and Term of Patent)

4. 35 United States Code, 281 (Remedies for Patent Infringement)

5. Rule 60(b), Fed. Rules Civ. Proc. (Mistake, inadvertence, etc.)

6. Rule 77(d), Fed. Rules Civ. Proc. (Notice of Orders or Judgments)

(Texts given in the Appendix, starting on page A 35)

STATEMENT OF THE CASE

The Parties

The Petitioner is a private inventor, residing at Winchester, Massachusetts. The Petitioner is co-inventor and owner of U. S. Patents Nos. 3,483,169 and 3,502,601, both in suit. Petitioner is co-owner and president of Eltron, Inc., a corporation of New Hampshire, with an office in Nashua, New Hampshire. Eltron is engaged in research and development of new polymer products.

Respondent BASF Wyandotte is a corporation of Michigan, with main offices in Parsippany, New Jersey. Respondent is a wholly owned and controlled subsidiary of Badische Aniline and Soda Fabriken, a corporation of the Federal Republic of Germany. Respondent is a supplier of raw materials to the polyurethane industry, and its products include raw materials for polyurethane foams.

Co-Respondent National Gypsum Company is a corporation of Delaware, with offices in Buffalo, New York. Co-Respondent is a manufacturer of building products, including insulation, such as urethane foam insulation and composites thereof.

The Action

The action in the district court, CA 75-5033-T, D. Mass., was an action for patent infringement (with exclusive jurisdiction residing in the federal courts under 28 USC 1338(a)), and for damages caused by antitrust violations (with jurisdiction residing in the federal courts under 28 USC 1337). The basis of the action was the allegations that Respondent BASF Wyandotte produced and sold various products which infringed the claims of the '169 patent in suit, and that the purchase and use of these products by Co-Respondent National Gypsum infringed the '601 patent

in suit. It was also alleged and shown that the sales of the accused products by Respondent BASF Wyandotte to Co-Respondent National Gypsum were made under especially favored conditions and circumstances, in violation of the anti-trust laws, including the Robinson-Patman Act. It was alleged that the favorable terms of sale between Respondents were the reason that Co-Respondent National Gypsum purchased the accused products, rather than the admittedly more satisfactory products offered for sale to Co-Respondent by Petitioner's company.

The Proceedings in the District Court

The action in the district court began with a failure of Respondent BASF Wyandotte to answer the complaint. Petitioner obtained a default against Respondent. Respondent then moved for setting aside the default, and the motion was granted

by the district court, despite Petitioner's showing that the affidavit in support thereof contained statements contrary to known facts.

Respondent then filed repeated motions for dismissal, asserting lack of personal jurisdiction and venue. These motions were denied.

For the first few years, the action was at a standstill. All discovery attempted by Petitioner was objected to by Respondent BASF Wyandotte, and assistance to enforce discovery was uniformly withheld by the various magistrates to whom the attempts were referred. Finally, in 1979, Petitioner filed a series of motions for summary judgment. All were denied, without explanation, and the district court took no action on Petitioner's complaint that the law firm of (local) counsel for Respondents had previously counseled Petitioner on the prosecution of the

patents in suit.

Even after the motions for summary judgment, Petitioner had extreme difficulty in obtaining discovery. Along the way, a petition to the Court of Appeals seeking expedition of the adjudicatory process, and more than one request or motion for action by the court, were filed.

Numerous items of discovery which were sought by Petitioner were never produced, nor required to be produced. A set of seven allegedly privileged documents of Respondent which evaluate the patents in suit were never inspected by the court in camera. The records of sales calls made by Respondent's salesmen, although ordered to be produced, were not. The original drafts of affidavits (those actually prepared by the witness) filed in the name of Respondent's "expert" witness were never produced for Petitioner's inspection.

What discovery was had, was under the supervision of a magistrate, and was conducted under an "expedited" schedule, which allowed for no follow-up to information gained in the discovery. Petitioner's attempts to complete discovery were met with overt hostility on the part of the magistrate, who haranged Petitioner and threatened a finding of contempt.

The trial in the action was held in reasonably straightforward fashion, with two notable exceptions:
(1) The court requested, and held, ex parte conferences with the parties "to assist in settling the action", and
(2) The court repeatedly foreshortened cross-examination of Respondent's "expert" witness.

Subsequent to trial, there was controversy, unresolved to date, regarding the timeliness, mode of delivery, and contents of Respondent's post-trial submissions to

the court.

The decision of the district court, adverse to Petitioner, was dated, and may have been entered, on August 31, 1983. Petitioner did not receive notification of that decision, and learned of said decision for the first time on inspecting the docket on November 23, 1983. A motion under Rule 60(b), requesting the vacating and reentering of the judgment, was filed two days later. In support of that motion, various instances of mishandling of the docket by the clerks were documented, elaborating the context in which notice of judgment was not received.

The Orders Complained Of

On January 3, 1984, the district court denied Petitioner's Motion under Rule 60(b), without a hearing or explanation.

Petitioner then filed an appeal on the merits, and a petition under the All Writs

Act, with the Court of Appeals for the Federal Circuit. The appeal addressed the merits of the decision of the district court, with emphasis on the failure to deal with anything other than an attempted literal reading of the claims, and with failure to comply with precedent. The petition demonstrated the manifold circumstances which make the failure to receive notice of the court's decision everything but a simple failure to receive notice, and to check on the docket.

The Court of Appeals declined to address the merits of the district court decision, and on July 3, 1984, dismissed the appeal, finding "no abuse of discretion" by the district court in denying Petitioner's Motion under Rule 60(b).

ARGUMENTS RELIED UPON FOR ALLOWANCE OF WRIT

I. A Patentee is Constitutionally Entitled to a Fair Infringement Trial Based on the Merits, and a Decision in Accordance with the Facts and Precedent.

1. A patent is property.

> "That a patent is property, protected against appropriation both by individuals and by government, has long been settled"
> Hartford-Empire Co. v. U.S. 323 U.S. 386, 415 (1944)

2. The property rights owned by the patentee are statutory, require resort to an action in the federal courts, and commits the Government to assist in the enforcement of the patent rights.

> "The Congress shall have power . . . To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."
> U.S. Constitution, Article I, Section 8 (Commerce Clause)

"Every patent shall contain a short title of the invention and a grant to the patentee . . . of the right to exclude others from making, using, or selling the invention throughout the United States . . ." 35 USC 154

"A patentee shall have remedy by civil action for infringement of his patent" 35 USC 281

"The heart of his (the patentee's) legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent." Zenith Radio Corp. v. Hazeltine Research 395 U.S. 100, 135 (1969)

"the inventor . . . gets the right to an exclusive use. Take this from him and you take all that the law gives him and to secure which the public faith is pledged." United States v. United Shoe Machy.Co. 247 U.S. 32, 58 (1917)

3. The property rights in the patent are Constitutionally guaranteed by the Fifth Amendment.

"No person shall . . . be deprived of life, liberty, or property, without due process of law;" U. S. Constitution, Amendment V

"The owner of personal property cannot be divested of his ownership without his consent, except by (due) process of law" Dows v. Nat. Exch. Bank of Milwaukee 91 U.S. 618,637(1875)

"The standpoint of due process (is) the protection of the individual against arbitrary action" Mr. Justice Cardozo, in Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio 301 U.S. 292, 302 (1936)

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known" Ohio Bell, supra, at 304

"The fundamental guarantee of due process is absolute and not merely relative" Hammond Packing v. Arkansas 212 U.S. 322, 350 (1908)

4. The Petitioner Patentee did not receive a fair trial on the merits, and a decision in accordance with the facts and precedent.

a) Petitioner obtained a court order requiring Respondent BASF Wyandotte to produce various business records. That order clearly read to include reports filed by Respondent's salesmen in calling on Co-Respondent National Gypsum Company. The original records were not produced,

but a small number of copies thereof, located in the research department files were produced. Petitioner sought to have the court order enforced. Respondent's position, as set forth in a sworn affidavit, was that Respondent did not keep such records, representative specimens of repeatedly revised versions of which had been produced, and which specimens referred to a file in which they were kept. The district court refused to enforce the court order for production.

Indeed, in searching through the files which were produced, clear evidence was found that they were incomplete, and probably had been "sanitized". The matter was brought to the attention of the district court, which took no notice or action.

Still further, when Petitioner sought enforcement of the court order for production, the presiding magistrate haranged Petitioner, and threatened him

with a contempt citation. A copy of the tape of that hearing was sought by Petitioner, and it was refused.

Even on these facts, it seems impossible to conceive that the district court intended to conduct a trial based on all of the available facts. The sales call reports of Respondent's salesmen calling on Co-Respondent undoubtedly would elucidate the unique pricing and availability of the products sold between Respondents (see below) and almost certainly would refer to Petitioner's patented products concurrently being evaluated by Co-Respondent National Gypsum Company. Thus, the sales call reports are manifestly relevant and material, even essential, to a trial on the merits of the combined infringement and antitrust action.

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."
Hickman v. Taylor 329 U.S. 495, 507 (1947)

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." Ohio Bell, ibid

"in such case (of constitutional question) the statute grants to this Court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question. Horner v. United States, 143 U.S. 570 . . ."
Burton v. U.S. 196 U.S. 283 (1905)

"Petitioner is entitled to a fair trial. He has not had it . . . Fair hearings are in accord with the elemental concepts of justice." Klapprott v. U.S. 335 U.S. 601, 615 (1948)

b) Respondent BASF Wyandotte produced a listing of seven allegedly privileged documents which admittedly evaluate Petitioner's patents in suit. All, or nearly all, of the documents cannot meet the established test of privilege. Specifically, none seems to be a confidential

communication seeking or giving legal advice). Those seven documents were never produced for an in camera inspection by the court, despite Petitioner's repeated urging.

Kerr v. U. S. District Court, 426 U.S. at 406 stands for the proposition that an in camera review of allegedly privileged documents is to be granted, on proper application. The documents in instant question could hardly be more relevant and material, being an evaluation of the patents in suit by the adverse party.

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1,9. . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green 282 U.S. 531, 541 (1930)

> "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. The Styria v. Morgan, 186 U.S. 1,9 . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result' Langnes v. Green 282 U.S. 531, 541"
> Burns v. U.S. 287 U.S. 216,222-3 (1932)

Does not Kerr v. U.S. Dist. Ct., supra, establish that an in camera inspection must take place, by law? How could any conscientious judgment by the district court not involve an in camera inspection? How could there not have been abuse of discretion? How could the order of the court of appeals been other than a pro forma attempt to avoid that court's responsibility?

c. The district court judge, at trial, repeatedly foreshortened cross-examination of the "expert" for Respondent BASF Wyandotte. Each time that witness

admitted on cross-examination that he had previously erred, or made a false statement under oath, the court further foreshortened the cross-examination. In addition, testimony by that witness on deposition revealed that the affidavits filed in the action by that witness were not his original versions thereof, but revisions prepared by counsel. Petitioner's requests for access to the witness's own drafts were objected to by Respondent, and denied by the district court.

Again, the district court acted in such a fashion as to deny Petitioner the facts on which a proper trial on the merits could be held. This was not manifest abuse of discretion?

d) Counsel for Respondents is a member of a firm which had previously counselled Petitioner on the patents in suit. The district court absolutely and totally ignored this very obvious conflict of

interest, when it was pointed out by Petitioner. Manifestly, the district court sees no necessity of conducting a trial with even the appearance of impartiality. This is not gross abuse of discretion? And just what is the function of the Court of Appeals?

e) The decision of the district court ignored data produced by Respondent BASF Wyandotte that (i) essentially all sales of its accused products are at different prices from every other sale of the same products, (ii) that the sales between Co-Respondents were at an especially favorable price, and under unique conditions, (iii) that such particularly favorable sales terms were necessitated by problems with the accused products sold between Co-Respondents, and the superior properties of Petitioner's product sold to Co-Respondent National Gypsum Company, and (iv) that Co-Respondents engaged in

reciprocal purchases of the accused products.

The decision of the district court stated that the case for antitrust violations "had not been proven," thus simply ignoring the facts.

> "it is a rule of law, that a finding which contradicts a fact admitted in the pleadings, is to be disregarded"
> M'Ferran v. Taylor and Massie
> 3 Cranch 270, 280

f) The decision of the district court totally ignored the prosecutions of Respondent's U.S. Patents which repatented Petitioner's patents in suit. Respondent's prosecutions clearly demonstrated the novelty, utility, and importance of the patents in suit, and that Respondent BASF Wyandotte was commercially practicing the inventions in issue.

g) The decision of the district court failed to rule on the issue of patent validity, and in ruling on infringement, dealt only with an attempted literal

interpretation of the claims, and ignored the art and the advances made thereover by the patents in suit.

> "in determinining the question of infringement, the Court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result.
> "it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained."
> Union Paper-Bag Machine Co. v. Murphy 97 U.S. 120, 125 (1877)

> "What constitutes equivalency must be determined against the context of the patent, the prior art, and the particular circumstances of the case. Equivalence, in the patent law, is not the prisoner of a formula and is not an absolute to be considered in a vacuum." Graver Tank v. Linde Air Prod. 339 U.S. at 609

Manifestly, the Petitioner did not receive a fair trial. The district court acted to exclude much very relevant and material evidence, and ignored much of that evidence which was before the court.

The conduct of the litigation by the district court, and that court's decision, could hardly be more antithetical to the guidelines established by this Court. This Court's pronouncements regarding the necessity for a fair trial, and the proper conduct of such a trial, read very well on paper, but seem to have no correlation with what actually goes on in a patent trial. Thus, just what is the function of this Court's decisions?

II. Because a patent is property, the rights to which are constitutionally protected, a patentee is constitutionally entitled to notice of an adverse decision in a patent infringement trial.

1. As shown above, there is no doubt that a patent is property, constitutionally protected by the Fifth Amendment. Hartford-Empire Co., supra, Dows v. Nat. Exch. Bank, supra.

2. The protection afforded by the Fifth Amendment extends beyond mere ownership of the patent, but also to a fair trial on the merits of infringement, and to an appeal of right as well (most particularly where due process was not afforded at trial).

> "The Court has also made it clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." Board of Regents v. Roth 408 U.S. 564, 571-2 (1972)

"These precious (Fifth-Amendment) rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it' Cohens v. Virginia, 6 Wheat 264 . . ." Miranda v. Arizona 384 U.S. 436,442 (1966)

"It was necessary . . . to insure that what was proclaimed in the Constitution had not become but a 'form of words' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 . ." Miranda,at 444

"Our concern for adequate safeguards to protect precious Fifth Amendment rights is, or course, not lessened in the slightest." Miranda, at 457

"Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They know that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635 . . . The privilege was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard' Counselman v. Hitchcock 142 U.S. 547, 562 . . . We cannot depart from this noble heritage" Miranda, at 459-60

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."
> Miranda, at 468

Petitioner did not receive notice of the decision of the district court, and there is no affirmative statement on record that the notice was actually sent, as required by Rule 77(d), F. R. Civ. P. Indeed, there is an affidavit on file (entered by Respondents) that counsel "checked the docket" shortly after the Respondents received mailed notice of the district court's decision. That act of checking would have meaning only if a question arose (as it did) with respect to entry of judgment. And that act of checking thus not only implies that notice was not sent to Petitioner, but further that Respondents were aware that notice

had not been sent.

It immediately follows, especially in view of Miranda, supra, at 468, that Petitioner is constitutionally entitled to receive notice of the district court's decision and judgment, so as to make "an intelligent decision as to (the) exercise" of an appeal on the merits, so as to assert the constitutionally guarantee of due process, denied at the trial.

3. Rule 77(d) is constitutionally precluded from operating to deny an appeal on the merits of a decision not rendered in accordance with the due process requirement.

Board of Regents, supra, holds that the Fifth Amendment rights extend well beyond the actual ownership question. And Miranda, supra, at 468, explicitly holds that the Fifth-Amendment rights extend to receipt of notice of legal action. Manifestly,

when constitutionally protected rights are involved, the last sentence of Rule 77(d) --"Lack of notice . .. by the clerk does not affect the time to appeal . . ."-- directly contravenes decisions of this Court which construe the Constitution, and thus Rule 77(d) is UNCONSTITUTIONAL on these facts. Notice must be given, to accord due process of law.

A prior decision of this Court, Hill v. Hawes, 320 U.S. 520, 523-4(1944), held that where notice of the district court's decision has not been given, an appeal on the merits must be allowed on facts far less compelling than here. Rule 77(d) was then amended so as to circumscribe (and negate) the Hill decision. But Hill was based on general principles of fairness, and reached no Fifth Amendment constitutional question. It is now clear, than when constitutional rights are involved, the amendment to the Rule 77(d) overreached

itself, and breached the most important constitutional rights of the Fifth Amendment. Hill stands as sound law, when placed on a constituional footing.

III. The Facts Call for Intervention by This Court, to Exercise its Function of Judicial Supervision.

Recounting only the most salient points:
(1) The district court denied access to the relevant discovery required for a proper trial on the merits,
(2) The district court conducted a trial not in accord with established standards,
(3) The district court rendered a decision not in accord with the facts or precedents set by this Court,
(4) The district court held ex parte contacts with the parties, and received a large "sealed" post-trial submission from Respondents, the contents of which are still undetermined, and access to which was denied to Petitioner,
(5) Petitioner did not receive notice of the district court's decision, although respondents did, and indeed, it appears

that Respondents were aware that notice was not sent to Petitioner.

(6) Petitioner's Motion under Rule 60(b) was denied by the district court, without explanation, and without hearing.

(7) It was demonstrated that the clerks of the district court did not handle the docket in accordance with the rules, during the time period in which the Motion under Rule 60(b) was pending.

(8) The Court of Appeals found that the district court "did not abuse discretion", in denying the Motion under Rule 60(b).

There can be no doubt that the handling of the action in the district court failed in numerous respects to conform to the standards of due process, established procedures for adjudication, and even to established ethical standards. Whatever the intent behind the denial of the Motion under Rule 60(b), there can be no doubt

that the effect of the failure to send notice of the district court's decision, and the denial of the Motion under Rule 60(b) was to preclude an appeal on the merits of the conduct of the district court. And the dismissal of Petitioner's appeal very conveniently relieved the Court of Appeals from fulfilling its duty to exercise judicial supervision.

Petitioner respectfully suggests that he at least cannot think of any known fact inconsistent with the possibility that a specific ex parte agreement existed or exists with counsel for Respondents, and that the post-trial submissions of Respondent contained extraneous matter of substance.

What, therefore, constitutes "abuse of discretion"? Indeed, if not present in the instant facts, does it exist at any time and under any circumstances?

Several decisions of this Court bear on the instant facts, and each such decision strongly calls for action on the instant facts by this Court:

> "(W)here the subject concerns the enforcement of the (rules) which by law it is the duty of this Court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule involved. As was said . . . were the Court' . . . to find that the rules have been practically nullified by a district judge, . . . it would not hesitate to restrain(him) . . .'"
> La Buy v. Howes Leather Co.
> 352 U.S. 249, 256(1957)

> "We granted certiorari, . . .,because of the wide implications of the decision below for the orderly administration of . . . justice in the federal courts."
> Will v. U.S. 389 U.S. 90, 94-5

> "The legal proposition that mandamus will lie in appropriate cases to correct willful disobedience of the rules laid down by this Court is not controverted." Will, ibid, at 100

"To take advantage of this reason (Rule 60(b)) the Rule requires a litigant to ask relief 'not more than one year after the judgment, order, or proceeding was entered or taken.' It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect." . . . But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part."
Klapprott v. U.S. 335 U.S. 601,613 (1948)

"Petitioner is entitled to a fair trial. He has not had it . . . Fair hearings are in accord with the elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court to . . . grant petitioner a fair hearing." Ibid, at 615

"The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. The Styria v. Morgan, 186 U.S. 1,9 . . . It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result' Langnes v. Green 282 U.S. 531,541"
Burns v. U.S. 287 U.S. 216, 222-3 (1932)

"The establishment of a clearly defined rule of action would be the end of discretion" "'Discretion means the equitable decision of what is just and proper under the circumstances.' "
The Steamship Styria v. Morgan
186 U.S. 1, 9 (1901)

"The term 'discretion' denotes the absence of a hard and fast rule. The Styria v. Morgan, 186 U.S. 1,9 . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."
Langnes v. Green 282 U.S. 531,541
(1930)

"If in a rare instance a district judge abuses the discretionary authority the want of which precludes an effective, independent judiciary, there is always the opportunity for corrective review by a Court of Appeals and ultimately by this Court." Mr. Justice Frankfurter, in Kerotest Mfg. Co. v. C-O-Two Fire Extinguisher Co. 342 U.S. 180,185
(1952)

Most particularly:

> "In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules . . . that the trial court . . . acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling . . ."
>
> Roche v. Evaporated Milk Assoc. 319 U.S. 21, 26 (1943)

A more clear set of facts showing a deliberate intent to "thwart appellate review of the ruling" could hardly be conceived. Rare though it may be that this Court exercises the function of judicial supervision, the instant facts demand that exercise:

> "Judicial supervision of the administration of . ... justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence"
>
> McNabb v. United States 318 U.S. 332, 340 (1943)

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IV. This Court Must Act to Restore the Patent System to the Constitutional Enablement and Statutory Intent, and to Fulfill the Public Trust, and to Protect the Public Interest.

The constitution, Article I, Section 8, enables the Congress to "promote science and the arts," by statutorily reserving to inventors "exclusive use" of their inventions for a limited time. The patent act manifestly attempts to accomplish this purpose. Various decisions of this Court have construed the patent act as granting statutory rights to inventor-patentees (U.S. v. United Shoe, supra; Zenith Radio Corp. v. Hazeltine, supra) and that these statutory rights are a solemn contract with inventor-patentees, to which the public faith is pledged, (Grant v. Raymond, 6 Peters 218,241-2 (1832)).

This reads well on paper, is unexceptionable in every respect, and had stood the

test of time. All of these are clearly a major force in encouraging would-be inventors to try to advance the state of the art, and to become patentees.

The instant facts demonstrate, however, that these words and pronouncements have lost their relevancy to the real world. Petitioner-patentee was denied even the appearance of a fair trial and decision on the merits, was repeatedly harassed in his attempts to obtain proper preparation for trial, and was pointedly not notified of the district court's decision, and thus denied an opportunity to appeal as a matter of right. The appeals court found there to be "no abuse of discretion" in all the doings of the district court.

The facts are that the patent act is now treated by the district courts as a playground for specialized lawyers. There is no cognizance of the constitutional and statutory basis of patent rights, and that

the public faith is pledged to assist the patentee. Instead, a patent infringement suit is a forum for unlimited games (which in the present case have now extended to nearly 9 years). Discovery rules mean nothing; precedent (including this Court's decisions) mean nothing; Fundamental precepts of due process, fair adjudication, and even ethical conduct are meaningless. And if an appeal looms, it can be avoided by the expedient of not allowing that appeal.

The effects of the degradation of the patent system are many, wide-ranging, and of greatest importance:

Because of the great expense and general futility of patent litigation, relatively few patents are ever litigated. And because of the general irrelevancy of the merits and law in whatever litigation takes place, issued patents have deteriorated in quality. There is, after all, no reward for careful preparation and prosecution of patent

applications. Fraud and other serious defects are rampant. In the instant case, for example, it was shown that Respondent BASF Wyandotte's U.S. 3,585,185 and accompanying patents are clearly invalid over Petitioner's patents in suit, and clearly fraudulent in view of their prosecution despite contemporaneous knowledge and evaluation of Petitioner's patents by Respondent. Also, the instant case shows the irrelevancy of such a serious matter as conflict of interest on the part of patent counsel. Even the factual content of patents has degraded to the point of absurdity. Petitioner recently observed a (now rare) large-scale patent trial, with six to eight lawyers on either side of the court room, and which lasted some two to three months (literally a million-dollar trial). Two of the patents involved in that trial embodied the remarkable discoveries that (1) light travels in a straight line, and (2) a

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dimensionally stable polymer remains stable when fabricated into a device.

> "The possession and assertion of patent rights are 'issues of great moment to the public' "
> "The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud and other inequitable conduct and that such monopolies are kept within their legitimate scope."
> Precision Instrument v. Automotive Maintenance Mchy. Co., 324 U.S. 806, 815-816 (1944)

These pronouncements do not control patent litigation as currently practiced, as shown.

Because of increasing awareness by innovating companies and inventors of the degeneracy of the patent system, there is a serious long-term trend toward the filing of far fewer patent applications. A quick perusal of the Patent Gazette reveals any number of large companies which were very active in patents in the 50's and 60's but which receive only a few patents each year in the 80's. Patent departments have been

decreased in size and importance, as have many research and development departments. Petitioner is aware of one local, rather large and famous,"high-technology" company which actually liquidated its research and development department some years ago.

Because of the non-workability of the patent system as constitutionally enabled "to reserve to the inventor exclusive rights to his invention", a shift has occurred in the patents which do issue, to become merely "defensive" in nature. The objective, a peculiar perversion of the patent process, is to patent your own invention, not so as keep infringers out, but to preserve your right to work your own invention. There is, in fact, a new law now in the works in Congress which attempts to facilitate and formalize the obtaining of merely "defensive" patents.

Another shift in strategy, more significant in import, is the switch away

from attempted (and unworkable) patent protection into the trade-secret route. One manifestation of this shift is the plethora of trade-secret litigation now noted in the "Silicon-Valley" computer-component industry. Any inventor with his wits intact currently is thinking along the lines of "what can be kept secret?" rather than "what can be carefully delineated and thus patented?" This leads to an entirely different type of innovation, and frequently one of a lower order of importance. (Obsession with secrecy automatically proscribes most new products). The chemical industry, once one of our premier "high-technology" industries, has been particularly hard hit. Back in the 30's, 40's, and 50's, when a patent was a patent, it was possible to invent a new chemical or polymer with important new properties and uses, to obtain a "composition-of-matter" patent (the strongest kind possible), and to have a

17-year monopoly on a new industry. Giant companies became that way by this route. Now, because of the infirmaties of the patent system, even a "composition-of-matter" patent is just an invitation to copiers, and an entry into expensive and pointless litigation. So that type of chemical innovation is no longer with us. The chemical giants have turned either to extremely large-scale production of established products (the "commodity" approach), converted themselves into oil companies (the "energy" approach), or become purveyors of small-scale, highly developed and diversified products ("specialties") or of "services". The industry has declined, as their profits and stock prices demonstrate, and the transformation of the patent system has played a material part therein. The closely-related pharmaceutical industry has also suffered a great decrease in the rate of introduction of new products. But there

can be no substitute for new drugs with which to attack public health problems. A consequence is that new pharmaceuticals in this country tend to be of foreign origin (such as the several important new drugs introduced from Japan in the last few years).

Even the national interest has been adversely affected by the decline of the patent system. As the American inventors have cut back their attempts at innovation, the number of domestic patent filings have fallen behind its potential. Foreign companies, less aware of and less affected by the failings of the U.S. patent system, have increased their share of U.S. patent filings. The foreign share of issued U.S. patents is now roughly about 50%, and increasing. Leadership and control of U.S. high technology is demonstrably passing into foreign hands.

Not only is high technology losing ground. Heavy ("smokestack") industry is

suffering even more strongly. The domestic steel industry is crippled, and at a serious disadvantage to the much more technically advanced Japanese and Korean steel industries. The U.S. auto industry, albeit a giant, is struggling to catch up with the technical advances of the Japanese auto industry.

Even national security is in jeopardy. It is indisputable that our armed forces depend on high technology for their effectiveness. As American innovation and technology lag behind, so does the national security. Is it possible to have first-rate national security, on a base of second-rate industry, and third-rate innovation? Or, for example, will U.S. missles soon be directed by computers using Japanese components?

C O N C L U S I O N

This Court must act. One decision cannot correct and compensate for decades of degeneration in the patent system. But one decision can begin a trend toward bringing patent litigation back into compliance with the Constitutional enablement, Congressional intent, and this Court's decisions. This Court clearly should grant this petition, so as to reach not only the constitutional questions presented herein, but also so as to provide guidance badly needed by the district courts and the CAFC, and required by the public interest.

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(ORDER DENYING MOTION UNDER RULE 60(b))

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

LESLIE C. CASE, Plaintiff	)	
v.	)	Civil Action No. 75-5033-T
BASF WYANDOTTE, et al., Defendants.	)	

MOTION UNDER RULE 60(b)

Plaintiff moves this Hon. Court, under Rule 60(b), F. R. Civ. R, for an order vacating and reentering this Court's judgment, so as to facilitate the appeal on this action.

The facts of the matter are, as shown in the accompanying affidavit:

(1) The Plaintiff failed to receive notice of judgment, either because of a failure to be properly sent, or of the mails

. . . .

Denied

J. Tauro D. J.

1/3/84

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

LESLIE C. CASE, Appellant, v. BASF WYANDOTTE AND NATIONAL GYPSUM CO., ET AL., Appellees.	)))Appeal No.) 84-753))

Before FRIEDMAN, KASHIWA, and MILLER,
Circuit Judges.

ORDER

PER CURIAM.

This is an appeal from a judgment of the United States District Court for the District of Massachusetts, dismissing a suit in which the appellant alleged that appellees had infringed two of his patents and had violated the antitrust laws. After trial, the district court held that the appelant had not shown either infringement or vi lation of the antitrust laws. The appellees have moved to dismiss the appeal as not timely filed. We hold that the appeal was untimely and dismiss it. We

also deny the appellant's petition for a writ of mandamus.

1. The district court rendered its opinion on August 31, 1983, and on the same day entered its judgment in favor of the appellees. The appellees state that on September 6, 1983, their counsel received in the mail the district court's opinion, and upon checking the court docket sheets on September 8, 1983, confirmed that the judgment had been entered on August 31.

On November 25, 1983, the appellant, pro se, filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure "for an order vacating and reentering this Court's judgment, so as to facilitate the appeal on this action." In a supporting affidavit the appellant stated that he had not received the court's opinion or order, and that he first learned of them upon visiting the clerk's office on November 23, 1983. The affidavit further stated

that the appellant "has several times since the trial in this action made visits to the office of the Clerk to check on the subject docket" and "has also checked the actual docket sheets from time to time. At the last such checking, prior to November 23, 1983, Affiant saw no notification of an order or judgment on the said docket."

On January 3, 1984, the district court denied without opinion the motion to vacate and reenter. On January 9, 1984, the appellant filed a notice of appeal from both the August 31, 1983 order dismissing the case and the January 3, 1984 denial of the rule 60(b) motion.

2. Since, as the appellant concedes, the notice of appeal, filed more than four months after the August 31, 1983 order dismissing the case, was untimely, the only theory upon which the appellant might press his appeal would be if he could establish that the district court improperly denied

the rule 60(b) motion. The determination whether to grant such a motion is a matter largely within the discretion of the district court, CTS Corp. v. Piher International Corp., 727 F.2d 1550, 221 USPQ 11 (Fed. Cir. 1984); Hand v. United States, 441 F.2d 529 (5th Cir. 1971); Consolidated Masonry and Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249 (4th Cir. 1967), and appellate review is limited to determining whether the court abused its discretion. Hand, 441 F.2d at 531.

The district court did not abuse its discretion in denying the motion in this case. The fact that the appellant did not receive the opinion and order upon issuance did not excuse his failure to file a timely notice of appeal. Hensley v. Chesapeake and Ohio Railway Co., 651 F.2d 226 (4th Cir. 1981). Cf. Rule 77(d) of the Federal Rules of Civil Procedure: "Lack of notice of the entry by the clerk does not affect

the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. . . ." The appellant was required to examine the records of the district court to determine whether the case had been decided.

Although the appellant stated in his supporting affidavit that "several times since the trial" he had visited the clerk's office "to check on" the docket and that he "also checked the actual docket sheets from time to time," he did not allege that he had regularly checked with the clerk's office or examined the court records with sufficient frequency to ascertain when the court decided the case. For all that appears, he may not have checked with the court within 30 or 60 days after the court decided the case on August 31, 1983. Indeed, at oral argument, the appellant admitted that he might have been somewhat remiss in

checking the records around that time.

Moreover, since the appellees stated that within two days of receipt of the court's decision, their counsel, upon checking the docket, confirmed that the judgment had been entered, it would seem that if the appellant also had checked the docket sheet in September, he, too, would discovered that the case had been decided.

For these reasons, we cannot say that the district court abused its discretion in denying the rule 60(b) motion.

3. The appellant also has requested us to issue a writ of mandamus, apparently to compel the district court to grant his rule 60(b) motion. A writ of mandamus, however, is an extraordinary writ. It cannot be used as a substitute for appeal, Roche v. Evaporated Milk Association, 319 U.S. 21 (1942), and can be used to control matters committed to the discretion of the district court "only in the exceptional

case where there is clear abuse of discretion." Bankers Life and Casualty Co. v. Holland, 346 U.S. 378, 383(1953); In re Precision Screen Machines, Inc., 729 F.2d 1428, ___USPQ ____(Fed. Cir. 1984); Mississippi Chemical Corp. v. Swift Agricultural Chemicals Corp., 717 F.2d 1374, 219 USPQ 577 (Fed. Cir. 1983). Since, as we have held, the appelant failed to note a timely appeal and the district court did not abuse its discretion by denying the rule 60(b) motion, there is no basis for issuing a writ of mandamus.

The appeal from the August 31, 1983 order is dismissed. The district court's January 3, 1984 denial of the rule 60(b) motion is affirmed. The petition for writ of mandamus is denied.

July 3, 1984
Date

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

In re Case, Petitioner) Appeal No. 84-753

PETITION FOR EXTRAORDINARY WRIT AND APPEAL

This Petition (and combined appeal) is submitted to this Honorable Court for the expressed and entire purpose of reversing the lower court's denial of Petitioner-Appellant's Motion to vacate and reenter the lower court's decision in CA 75-5033-T, D. Mass., and/or to enter Petitioner-Appellant's appeal on the merits of that decision onto the docket of this Honorable Court.

M E M O R A N D U M

STATEMENT OF THE FACTS

Civil Action No. 75-5033-T, D. Mass., was an action for patent infringement, and ancillary antitrust violations. The court below handed down a decision and judgment

in that action several months ago. The date of the decision is given on the docket sheets as August 31, 1983 (Exhibit M).

However, entries on the docket are not necessarily made on the date listed on the docket. As shown on the reverse side of Exhibit M, that was the last page of docket entries as of December 19, 1983, as certified by a deputy clerk. The last entries listed on the Exhibit M are dated December 5, 1983. When Petitioner requested certification, he remarked to the certifying clerk that the docket entries were incomplete. The said deputy clerk stated that he had no reason to doubt that such was the case, and proceeded to make the certification.

As shown in Exhibit N, a copy of the last page of the docket as made by Petitioner-Appellant on January 4, 1984, three entries predating December 19, 1983, by from 6 days to 12 days had been entered

onto the docket by that time.

In any event, Petitioner-Appellant received no notification from the clerk of the decision of the court below. On November 23, 1983, Petitioner-Appellant visited the clerk's office, inspected the docket, and found that the decision of the court below had purportedly been entered on August 31, 1983.

Petitioner-Appellant then filed on November 25, 1983, a Motion under Rule 60(b) (Exhibit B) and supporting Affidavit (Exhibit C). The grounds for that motion to vacate and reenter were in conformity with Rule 60(b)(1), F. R. Civ. P., stating that, and demonstrating, notice of the court's decision had not been received, and that Petitioner had established a pattern of checking on the docket as acknowledged by the docket clerk. An oral hearing was requested.

Petitioner-Appellant's motion was

opposed by the Respondent-Appellees on or about December 5, 1983. (Oppositions not exhibited).

Petitioner-Appellant had long been aware of facts strongly indicating that Respondent-Appellee's post-trial briefs had probably not been timely filed, that there was not docket entry for these briefs (Exhibit M), and that the only docket entry which could refer to these briefs ("Confidential information", Jan. 31, 1983) appeared to be predated. Accordingly, on December 7, 1983, Petitioner filed a motion for access to the record, seeking to inspect the filed copies (if any) of Respondent-Appellee's briefs (Exhibit D). Exhibit A attached to the original of this petition (sic) is Petitioner-Appellant's service copy of one of the said briefs. It is noted that the affidavit of service was not executed, and that the brief was not signed by local counsel in his own hand,

but was apparently signed by out-of-town counsel in local counsel's name. (Attached as Exhibit A to the copies of this petition are copies of only the first, next-to-last, and last pages of the said brief). There are no indications on the docket (Exhibit M) of any ratifications, explanations, or leave for belated entry of the "Confidential information", allegedly submitted on January 31, 1983.

Petitioner-Appellant then filed on December 13, 1983, a supplemental memorandum and affidavit in support of his Motion under Rule 60(b). (Exhibits E and F). These papers pointed out the apparently incorrect entry of January 31, 1983, onto the docket, and the irregularity in refusing access of a party to the record. These matters were no longer within the ambit of Rule 60(b)(1) (mistake or inadvertence), but now moved into the regime of Rule 60(b)(6) ("any other reason"--conventially

applied in matters of serious irregularity and/or gross abuse of discretion).

On or about December 19, 1983, Respondent-Appellees filed an opposition to Plaintiff's motion for access to the record, together with an affidavit, and further argument against the granting of the Motion under Rule 60(b) (attached as Exhibit G). These pleadings continued to request that access to the record be denied. In place of reference to the record, wherein the time and date stamp might demonstrate when the post-trial briefs were filed, these pleadings relied on an affidavit purporting to state when the said pleadings were presented to the court.

On December 22, 1983, Petitioner-Appellant filed a response, showing that the Affidavit of December 19 was inconsistent with the documents attached thereto, and with known facts (Exhibit H).

On January 3, 1984, the court below

entered orders allowing access to the record (Exhibit I) and denying, without hearing or explanation, the motion under Rule 60(b) (Exhibit J).

On January 4, 1984, and January 5, 1984, as already demonstrated before this Honorable Court, Petitioner-Appellant attempted to gain access to the record, as allowed by the court below (Exhibit L). That access was again denied, as has been demonstrated.

On January 5, 1984, the clerk of the court below issued a notice contemplating destruction of the trial exhibits (Exhibit K).

The Petitioner-Appellant filed notice of appeal and petition on January 9,1984, with the Appeals Clerk, D. Mass.

Petitioner-Appellant visited the office of the appeals clerk, D. Mass., on January 19, 1984, and found in the record on file an envelope marked as No. 493,(Copy attached

as Exhibit P). In the envelope the Petitioner found just one brief, copies of the first, next-to-last, and the last pages attached hereto as Exhibit Q. Petitioner failed to find a copy of the post-trial brief, attached hereto as Exhibit A. (Copies of the first, next-to-last, and last pages are attached as Exhibit A to the copies of this petition).

On January 21, Petitioner received a response from Respondent-Appellee National Gypsum, indicating that counsel had already seen some of the papers not yet received by Petitioner.

On January 24, petitioner received service copies of motions from Respondent BASF wyandotte, dated January 19, 1984.

THIS COURT HAS JURISDICTION OF THIS PETITION-APPEAL

1. This court has specific and exclusive statutory jurisdiction of the appeal on the merits of the decision in CA 75-5033-T,

which was basically an action for patent infringement.

2. There is precedent for entertaining a timely appeal of denial of a motion under Rule 60(b), and for reversing that denial on grounds of abuse of discretion. Expeditions Unlimited Aquatic Enterprises v. Smithsonian Institute (CADC, 1974) 500 F.2d 808.

3. This Honorable Court has jurisdiction under the all writs statute (28 USC 1651) to entertain an extraordinary writ in aid of its respective jurisdiction (exclusive jurisdiction over patent appeals).

> "a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal"
> Mr. Chief Justice Stone, in Roche v. Evaporated Milk Ass'n. 319 U.S. 21, 26 (1942)

> "Since the Court of Appeals could at some stage of the . . . proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them."
> La Buy v. Howes Leather Co. 352 U.S. 249, 255 (1956)

"it (is) the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."
McClellan v. Carland, 217 U.S. 268, 280 (1909)

"in Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943), Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'"
FTC v. Dean Foods Co. 384 U.S. 597, 603 (1965)

Both the CCPA and the Court of Claims have found that they had jurisdiction under the All Writs Statute, and both have issued extraordinary writs thereunder:

Duffy v. Tegtmeyer (CCPA,1974) 489 F.2d 745, 747

Cook v. Dann (CCPA,1975) 522 F.2d 1276

Reddy v. Dann (CCPA,1976) 529 F.2d 1347, 1348

Import Motors Ltd. v. U.S. Inter. Trade Comm. (CCPA,1975) 530 F.2d 937,940, (Extraordinary writ issued)

U.S. v. Boe (CCPA,1976) 543 F.2d 151, 161 (Extraordinary Writ issued)

Gulf +. S. Am. Steamship Co. v. U.S. (Ct. Claims, 1974) 500 F.2d 549, 555-556 (Writ issued)

The Supreme Court has found that there need not be a perfected appeal, but that the All Writs Statute applies to an appeal which might be perfected (Roche v. Evaporated Milk Assn., supra, and FTC v. Dean Foods Co., supra). Thus, the All Writs Statute clearly applies where the only purpose is to reach the appeal on the merits, which might otherwise be defeated without reaching the merits. (McClellan v. Carland, supra)

> "Among (the various conditions for the issuance of an extraordinary writ) are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires" Roche v. Evaporated Milk Assn.,supra at 26, Kerr v. U.S. Dist. Ct., 426 U.S. 394, 403 (1975)

THE MOTION UNDER RULE 60(b) WAS FULLY MERITIOUS. AND IT WAS AN ABUSE OF DISCRETION TO DENY THAT MOTION

It was not contested that Petitioner-Appellant failed to receive notice of the decision of the court below. And it was acknowledged by the clerk of the court below that Petitioner-Appellant had established a pattern of checking on the docket. Further, it has been demonstrated that docket entries (such as of the decision and judgement) are not necessarily made on the date listed.

Thus, there is manifestly more than mere failure to give notice of the court's decision. The pattern of checking on the docket is in conformity of the decisions cited in the Motion under Rule 60(b) (Exhibit B). Rule 77(d) was clearly transcended.

> "where the movant has shown a meritorious defense, the itemized grounds for relief under the Rule (60(b)) ' are to be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments . . . Any doubts about whether relief should be granted should be resolved in favor of setting aside the default . . . Tolson v. Hodge (4th Cir. 1969), 411 F.2d 123, 130; Brennan v. Midwestern United

Life Insurance Co. (7th cir., 1971), 450 F.2d 999, 1003, cert. denied, 405 U.S. 921, . . . State of Iowa v. Union Asphalt and Roadoils, Inc. (S.D. Iowa 1968), 281 F.Supp. 391, 398, aff'd 8th Cir. 408 F.2d 1171. In short, any considerations of the need 'to expedite cases, to fully utilize the court's time, to reduce overcrowded calendars and to establish finality of judgments . . . should never be used to thwart the objectives of the blind goddess' of justice itself. Boughner v. Secretary of Health, Ed. and Welfare, U.S., 572 F.2d at 978-79"

Compton v. Alton Steamship Co. (CA 4, 1979) 608 F.2d 96, 102-3 (relying on Moore's Fed.Practice Par. 60.27(1) at pp. 346-47)

It was clear abuse of discretion to deny the motion under Rule 60(b). (Expeditions Unlimited, Supra).

The 10th Circuit, in Fleming v. Gulf Oil Corp., 547 F.2d 908, 913-914, reversed the district court in similar circumstances.

"the appellant was not given a fair opportunity to be heard . . . That case was disposed of without notice or legal authority."

THE DEMONSTRATED MISHANDLING OF THE DOCKET INVOKES RULE 60(b)(6)

There was systematic abuse of procedure by the clerks of the court below, which acted to aid the cause of Appellee-Respondents. (Clearly,it is not necessary to establish evidence of specific collusion or out-and-out corruption):

1. There was an apparent incorrect entry of the date of submission of post-trial briefs.

2. The post-trial briefs bore informal signatures and affidavits of service. No ratifications were filed.

3. Inspection of the record was denied, even after the granting of a court order.

4. Inconsistent entries were made on the docket (Exhibits M and N).

5. An inconsistent affidavit of December 19 was entered, and apparently relied upon, rather than refer to the record.

6. The clerk contemplates the destruction of the record, in view of an impending appeal.

All of the above bear with immediate relevancy on Petitioner's failure to receive notice of the decision of the court below. It was a gross, blatant abuse of discretion for the court below to deny the motion under Rule 60(b), when the immediate result would be to cover-up for the misdeeds of the court's clerks.

Gross abuse of discretion mandates reversal of the denial of the motion under Rule 60(b):

> "Fair hearings are in accord with the elemental concepts of justice, and the language of the "other reason" clause of 60(b) is broad enough to authorize the court to set aside the . . . . judgment and grant petitioner a fair hearing" Klapprott v. U.S. 335 U.S. 601, 615 (1948)

> "(the)'All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion'". La Buy v. Howes Leather Co., supra at 257, citing Bankers Life and Casualty Co. v. Holland, 34 U.S. 379,383(1953)

"Considerations of importance . . . are that the trial court, . . . acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling" Roche v. Evaporated Milk Assoc., supra at 26

Extraordinary writs are to be used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so" Roche v. Evaporated Milk Assn., supra at 26
Platt v. Minnesota Mining Co. 376 U. S. 240, 245 (1963)

The action of the lower court in denying an opportunity for appeal surely "has thwarted or tends to thwart appellate review", Roche, supra. The lower court's action takes on even greater significance when it is noted that its clerks were present at the quaint ex parte conferences held by the lower court with the parties, during the trial in the action below. Further, just what originally was in the "Confidential Information", Docket No. 493? What connection, if any, exists

between the ex parte conference, the apparent failure to send notice of the decision, the adamant refusal to allow inspection of the record? Is there any connection with the decision itself? What happened to the second post-trial brief in the record? Was anything other than the second brief removed from the "Confidential information", Docket No. 493? Was there any extraneous information in the filing which ties all these matters together in some fashion which demands secrecy?

Turning to Exhibit P, note the hand-written dates, in place of the usual date- and time stamp. Why did this happen? Was the date stamp unavailable, such as by being located at some other place other than where the handwritten notation was made? Where? Would the date stamp have shown other information, than shown in the handwritten notation, such as some

other date? Why did the clerks so strenuously resist the inspection of this document? Doesn't all this have the obvious color of irregularity?

It should also be noted in Exhibit P, and Exhibit A, (assuming that Exhibit A will at some time become part of the record) that these briefs purport to bear the signature of then local counsel. But that signature was initialled as being affixed by out-of-town counsel. Also note that the affidavits of service were not executed. Clearly, local counsel must not have had an opportunity to read these briefs, or to sign them in his own name. There are manifest violations, about 4 in all, of Rule 11, F. R. Civ. P. Were these violations a consideration in refusing to allow inspection?

It should be further noted that the clerk has apparently affixed small tags of paper, bearing the notation of No.

493, to the envelope and remaining contents, Exhibits P and Q. Is this a usual procedure? It seems to be the only such circumstance in the instant record. Isn't this indicative of "special" attention to the particular filing? When were those tags affixed? Why?

The most immediate issue is Rule 60(b)(1). Can it possibly be disputed that the clerk's involvement far surpassed mere failure to give notice of the decision, and thus that the said motion, Exhibit B, must be granted? Isn't blatant abuse of discretion in denying that motion established beyond controversy?

Also in issue is Rule 60(b)(6). Isn't it manifest that the court below, and its clerks, engaged in such behaviour as to require invocation of that Rule, so that this Honorable Court may review the proceedings below, and restore some semblance of order and conformity with acceptable procedure?

THIS COURT HAS INHERENT JURISDICTION ON THE FACTS

It is recognized that courts, particularly courts of appeal, have inherent jurisdiction over matters brought to their attention which involve "fraud on the court", or where there "might have been" a "fraud on the court". Wright and Miller, Fed. Practice and Procedure, Civil, 11, Chap. 8, Par. 2870. The leading authority is, of course, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), wherein a case was reopened and a judgment vacated, long after the decision, because of fraudulent conduct on the part of the prevailing party. More specific grounds for this jurisdiction are "corruption of the judicial process", Wright and Miller, supra at 255, Lockwood v. Bowles (D.D.C., 1969) 46 FRD 625, 632, "Improper influence on the court" Wright and Miller, supra at 255, Root Ref. Co. v. Universal Oil Prods.

Co. (CA 3, 1948) 169 F.2d 514, 535-41, cert. den. 335 U.S. 412, and "bribery of a judge" Wright and Miller, supra, Root Ref. Co., supra, Chicago Title and Trust Co. v. Fox Theatres Corp. (D.N.Y., 1960) 182 F. Supp. 18.

Petitioner does not assert that there has been "bribery of a judge" or necessarily that there has been "improper influence on the court." Whether there has been "corruption of the judicial process" is a matter left to a determination by this Honorable Court. But it is absolutely manifest that the handling of the subject action in the court below, culminating in a failure to give notice of the decision, denial of the motion under Rule 60(b) and for access to the official record, and a threat to destroy to record needed for appeal, represents a grave departure from accepted norms of judicial action. That departure clearly

discredits any perception of judicial integrity. Is it corrupt? Let this court decide.

Petitioner submits that the doings in the court below, whether or not "corrupt", or caused by "improper influence", are manifestly so far removed from acceptable procedure as to confer jurisdiction on this Honorable Court, under the line of authority just relied upon. Perhaps this Honorable Court might choose to enlarge upon Wright and Miller, and establish an overall category wherein a demonstrated threat to the public perception of judicial integrity invokes inherent jurisdiction. That would seem to be perhaps the mildest fashion in which to phrase the issue.

THE DENIAL OF THE MOTION UNDER RULE 60(b) WOULD THWART AN APPEAL ON THE MERITS, OF MANY STRANGE DOINGS IN THE COURT BELOW. RULE 60(b)(6) MUST APPLY

The Statement of Issues presented for Review, already filed with this Honorable Court, sets forth many matters, most of which are unbelievable, inordinate, or both. Petitioner-Appellant often thought during the course of the proceedings that the proceeding obviously could not stand an appeal on the merits from his side of the action, and wondered how the court below could justify its actions, in case of appeal. Now, everything may be clear--was it always intended that there be no appeal on the merits?

In any event, the action of the court below in denying the motion under Rule 60(b) has the undeniable effect of preventing an appeal on the merits of a decision which cannot be justified, condoned, or

allowed to stand. The decision must be reviewed on the merits. The actions of the court below amount to the "usurpation of power", denying this Honorable Court of its statutory jurisdiction, which is the ultimate and mandatory grounds for exercise of the All Writs Statute:

Roche v. Evaporated Milk Assn., supra at 26

Will v. U.S., 389 U.S. 90, 95(1967)

Kerr v. U.S. Dist. Ct., supra, at 402

La Buy v. Howes Leather Co., supra, at 257

To consider just one issue presented for review, a copy of the allegedly privileged document listing is appended hereto as Exhibit O. Here are seven documents referring to the patents in suit. None were ever submitted to the court below for an in camera review. All have been summarily withheld. On the face of this listing, most cannot be privileged. (Note that most are not between a lawyer

and a putative client. Note the numerous recipients of copies. Note that one was even sent to the file room --TIC).

It is well settled indeed that such documents are to be inspected in camera before deciding on a claim of alleged privilege. Kerr v. U.S. Dist. Ct., supra at 404-405, clearly holds that such an in camera inspection is to take place. There is but one manner in which that inspection may not take place here, and the next step is that this Honorable Court assert jurisdiction over the appeal on the merits.

Let us proceed with that appeal on the merits, and determine how this Honorable Court may act within its Congressional charter to see that patent actions proceed in accordance with the rules, precedents, and precepts of conduct, and that such actions are to be decided on the merits.

Respectfully submitted,

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January ,1984

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, SECTION 8

1. The Congress shall have power: . . .

8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time or war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

35 USC 154 (CONTENTS AND TERM OF PATENT)

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of issue fees as provided for in this title, of the right to exclude others from making,using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

35 USC 281 (REMEDIES FOR PATENT INFRINGEMENT)

A patentee shall have remedy by civil action for infringement of his patent.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

. . . .

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

. . . .

or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment was entered or taken.

. . . . . .

Rule 77(d) Notice of Orders or Judgments.

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

MOTION FILED
OCT 16 1984

84- 415

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA
OCTOBER TERM,1984

LESLIE C. CASE,Plaintiff-Appellant-
Petitioner,

v.

BASF WYANDOTTE CORP.(A corporation of
Michigan), and

NATIONAL GYPSUM COMPANY (A corporation
of Delaware),

Co-Defendants-Appellee-

Respondents.

IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

MOTION FOR LEAVE TO FILE

BRIEF AMICUS CURIAE AND
BRIEF OF BARBARA N. WYATT
AMICUS CURIAE, PRO SE.

BARBARA N. WYATT as Amicus Pro Se

October 11, 1984

MOTION

Amicus Curiae, Barbara N. Wyatt,moves for leave to file a brief on behalf of the statement of Petitioner Leslie C. Case for a Writ of Certioari to the Supreme Court. The offered statement accompanies this motion.

Amicus was recently informed of this case by Dr. Case. Amicus is commenting based on: experience using the patent system; as past president of Worcester Area Inventors* Club; as current director of the National Congress of Inventor Organizations; as a member of the advisory board of the Small Business Service Bureau (based in Worcester,MA); and current Trustee ofthe National Small Business Association (based in Washington,D.C.).

The instant case is an example of the difficulties and abuses inventors as citizens encounter in their attempt to secure respect and reward for their inventive efforts.

The ever-increasing legal costs and complexities are prohibiting inventors from

asserting their legal rights. I pray the court move to consider the plight of inventors and to ensure they and the system are afforded due respect.

Amicus requests the inventor's position be considered lest the public and inventors witness further deterioration of the patent system.

Article I, Section 8, of the U.S. Constitution seeks to encourage science and the useful arts. In reality, the present system is proving discouraging to inventive efforts.

We have met many inventors through various inventor groups. Most new inventors honestly believe they will secure seventeen years of protection once their United States patent is granted. Only when their "successful" patents are challenged do inventors learn their only right is the right to exclude others.

The hard reality is that most independent inventors cannot afford to exercise their right to exclude others.

One key question becomes: Does an inventor really have any rights if he cannot afford to sue? Many inventors, not satisfied with lower court decisions, cannot afford appeals. These inventors have had to expend energies litigating because they could not afford representation.

Did the creators of this patent system ever envision they would be creating a legal albatross that could no longer function for the very individuals they were supposed to be encouraging?

I would like to request that the Supreme Court consider the "rights" of inventors in light of this present case.

Consider too the way the system has evolved to make it the burden of the inventor to prove validity——twice; once, for the Patent Office and again in the Federal Courts. Why is the inventor-citizen presumed "guilty" when all he was trying to do was to secure protection to warrant investment in a new and better product for public consumption?

I doubt our founding fathers wanted to put our inventors on trial to eventually discourage their creative work.

A country's economy is only as strong as its weakest link. The treatment of in-

dividual inventor rights and the validity issue in the Federal Courts has become the weak link.

The last few years we have met more and more discouraged inventors. The marketplace will not witness the fruits of their inventive work as long as the present system nips and gnaws away at their creative energy.

With due respect to the courts, on behalf of all inventors, I beg that this court help secure the actuality of "due process" to citizen inventors and help encourage science and the useful arts in America. There can be little invention and innovation in a system that fails to recognize and respect the rights of individual inventors, and in effect, sanctions and encourages copying and disrespect for its inventors.

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-415

In The

Supreme Court of the United States

October Term, 1984

LESLIE C. CASE,

Petitioner,

v.

BASF WYANDOTTE CORPORATION and
NATIONAL GYPSUM COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT BASF WYANDOTTE CORPORATION'S BRIEF IN OPPOSITION

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BASF WYANDOTTE CORPORATION

October 18, 1984

BEST AVAILABLE COPY

50pp

QUESTIONS PRESENTED FOR REVIEW

There are no questions in this case which merit review by the Court. The five "questions presented" by Petitioner are simply a guise by which he seeks to have this Court review every grievance he has raised since the start of this litigation, from the early discovery disputes, through trial, decision on the merits and the Court of Appeals' plainly proper, unanimous decision that the District Court did not abuse its discretion in denying Petitioner's Rule 60(b) motion to vacate and to reenter judgment.

STATEMENT PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of this Court, respondent BASF Wyandotte Corporation states that it is a wholly-owned sub-

sidiary of BASF Aktiengesellschaft, a foreign corporation, in Ludwigshafen-Rhine, West Germany. It has no subsidiaries or affiliates.

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No. 84-415

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LESLIE C. CASE,

Petitioner,

v.

BASF WYANDOTTE CORPORATION and
NATIONAL GYPSUM COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT BASF WYANDOTTE CORPORATION'S BRIEF IN OPPOSITION

I. COUNTERSTATEMENT OF THE CASE

A. Introduction

Petitioner, Dr. Case, for the first time, argues in his Petition that his complaints about the conduct of the District Court and the Court of Appeals raise

constitutional issues. No such constitutional issues were presented either to the District Court or to the Court of Appeals.

Stripped of their constitutional rhetoric, Petitioner's arguments boil down to a disagreement with the decision on the merits by the District Court and an assertion that the District Court abused its discretion in denying his motion under F.R.Civ.P. 60(b). Petitioner rests his arguments on unsupported and unsupportable allegations of misconduct below. The District Court and the Court of Appeals, which had full access to the record and the opportunity to observe the Petitioner, rejected those allegations. There is no reason for this Court also to consider them.

B. The Proceedings Below

Petitioner commenced this action on December 9, 1975, charging Respondents with patent infringement. Later, he amended his complaint to allege unspecified antitrust violations. After extensive discovery and pretrial proceedings, the Court heard the evidence in a six-day bench trial.

The District Court entered its decision on August 31, 1983. It correctly held that Respondents had not infringed Petitioner's patents and that Petitioner had failed to prove his antitrust allegations.* The Court did not decide the issue of patent validity, but did note that, were it to accept the definition of the patent claims urged by Petitioner, "it is quite likely" that the claims would have been invalid.

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* A copy of the District Court's Memorandum is attached hereto as an Appendix.

Having found non-infringement, the District Court said nothing about the unrebutted evidence that, during the prosecution of his patents, Petitioner had submitted improper experimental data to the Patent Office and had withheld other material data from the Patent Office -- evidence which demonstrated both the invalidity and unenforceability of those patents.

The District Court correctly determined that Petitioner's antitrust charges had no substance; they were "highly speculative" and "not reinforced by credible evidence".

Counsel for respondent BASF Wyandotte Corporation ("Wyandotte") received its copy of the Court's decision by mail on September 6, 1983 and counsel for co-defendent and co-respondent National Gypsum Company received its copy by mail on September 7. On September 8, Respond-

ents checked the District Court docket sheets and confirmed that judgment had been entered on August 31.

On September 12 and 19, respectively, the District Court's Memorandum Decision was excerpted in two legal reporters, 11 Massachusetts Lawyers Weekly 1522 and 1983-2 Trade Cas. (CCH) ¶ 65,600.

On November 14, 1983, counsel for Wyandotte wrote to Petitioner about disposition of documents produced to each side under a Protective Order, "now that this action has been terminated."

On November 25, 1983, Petitioner filed a motion pursuant to F.R.Civ.P. 60(b) requesting that the District Court vacate and reenter the August 31, 1983 judgment. Petitioner claimed that he had not received notice of entry of judgment. He further alleged that he had checked the docket sheet on November 23, 1983, and at that time first discovered

entry of the Court's decision. Based on this asserted "failure of communication", Petitioner sought reentry of judgment for purposes of appeal.

Respondent Wyandotte opposed Petitioner's motion on the grounds that Petitioner had not been diligent in ascertaining the status of his action, that no misrepresentation had been made to him about the docket entries or the status of the action, and that Respondents would be prejudiced by reentry of judgment.

Petitioner responded with two supplemental memoranda in which he argued that there was "irregularity" in the filing and docketing of certain of Wyandotte's post-trial papers in the case. Respondent Wyandotte answered these charges by establishing that the papers were properly and timely filed.

On January 3, 1984, the District Court denied Petitioner's motion.

Petitioner filed a Notice of Appeal to the Court of Appeals for the Federal Circuit on January 9, 1984, appealing both from the District Court's August 31, 1983 judgment and from its January 3, 1984 denial of his Rule 60(b) motion. Petitioner also filed a petition for writ of mandamus directing the District Court to vacate and reenter its judgment. Respondents' motion to dismiss Petitioner's appeal on the merits from the August 31 judgment was deferred pending briefing and oral argument on all issues raised by Petitioner.

In his appeal briefs, Petitioner argued in detail why he disagreed with the District Court's holdings that Respondents had not infringed Petitioner's patents and had not violated the antitrust laws, and why he disagreed with the

District Court's conduct of the pretrial proceedings. In his petition for writ of mandamus, Petitioner argued that the District Court's decision on Petitioner's Rule 60(b) motion was an abuse of discretion. In both his petition and appeal briefs, Petitioner recited a long list of what he referred to as "irregularities" and "systematic abuses" in the District Court -- the same ones he attempts to have reviewed here. Wyandotte in its briefs dealt with each of these unfounded allegations.

Petitioner presented oral argument to the Court of Appeals both on his appeal on the merits from the August 31, 1983 judgment and on his various contentions about misconduct by the Court below and the denial of his Rule 60(b) motion. With respect to his Rule 60(b) motion, the Court of Appeals pointed out to Petitioner that he never alleged that he

had checked the District Court records within 30, or even 60, days of the decision on the merits on August 31, 1983. In response, Petitioner "admitted that he might have been somewhat remiss in checking the records around that time."*

On July 3, 1984, the Court of Appeals rendered a per curiam decision** in which it dismissed Petitioner's appeal on the merits as untimely and denied his petition for writ of mandamus. Based on the factual record and oral argument, the Court of Appeals properly determined that "[t]he district court did not abuse its discretion in denying the motion [under Rule 60(b)] in this case." 737 F.2d at 1035.

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* Case v. BASF Wyandotte, 737 F.2d 1034, 1035 (Fed.Cir. 1984).

** Id.

II. REASONS FOR DENYING THE WRIT

Petitioner has been afforded due process of law.

The Petition simply recapitulates the unsupported and unsupportable allegations which this experienced litigator unsuccessfully advanced in the District Court and the Court of Appeals.*

Petitioner received a full and fair trial on the merits of his patent and antitrust claims and he had a full opportunity to brief and argue his appeal on the merits. He has no legitimate basis upon which to attack the decision or the integrity of the District Court. His accusations of misrepresentation, irregu-

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* This is the second Petition for Writ of Certiorari filed by Petitioner this year. The first, which was filed in connection with the decision in Case v. CPC Intern., Inc., 730 F.2d 745 (Fed.Cir. 1984), was denied on October 1. See Case v. CPC International, Inc., ___ U.S. ___, 53 U.S.L.Week 3241 (October 1, 1984).

larity and fraud were considered and rejected by tribunals that had the opportunity to observe his demeanor and assess his credibility.

Similarly, his Rule 60(b) motion, appeal therefrom, and petition for writ of mandamus were properly decided under the applicable F.R.Civ.P. 60(b) standards and criteria.* As the Court of Appeals stated, lack of notice of judgment is not by itself a ground for extending the time for appeal. See F.R.Civ.P. 77(d). Instead, whether or not a failure to appeal because of lack of notice will be

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* See, e.g., Alamo Chemical Transp. Co. v. M/V Overseas Valdes, 726 F.2d 1073, 1074-75 (5 Cir. 1984); Sherrill v. Sou-Tex Chemical Co., Inc., ___ F.2d ___, 35 F.R.Serv.2d 67, 68 (4 Cir. 1982); Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 229-30 (4 Cir. 1981); Scola v. Boat Frances, R., Inc., 618 F.2d 147, 152, 155 (1 Cir. 1980); In re Morrow, 502 F.2d 520, 522 (5 Cir. 1974). See also Mizell v. Attorney General of State of N.Y., 586 F.2d 942, 944-45 n.2 (2 Cir. 1978), cert. denied 440 U.S. 967 (1979).

excused, by vacating and reentering judgment, depends upon such traditional F.R.Civ.P. 60(b) factors as diligence of the appealing party and prejudice to the other parties. With these criteria in mind the Court of Appeals properly reviewed the District Court's actions for abuse of discretion* and found none. The Court of Appeals also correctly stated that a writ of mandamus "cannot be used as a substitute for appeal...." 737 F.2d at 1035.**

No issue of the constitutionality of Rule 77(d) was implicated in the briefs before the Court of Appeals. No such constitutional issue was raised by that Court's decision.

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* See, e.g., Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978); Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 231 (4 Cir. 1981).

** See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34-35 (1980).

There is no "special and important" reason for this Court to reexamine any of the lower courts' determinations here. See Rule 17.1 of the Rules of the Supreme Court of the United States. Petitioner has had his day in court, and more. Justice now requires that this litigation come to an end.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

October 18, 1984

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LESLIE C. CASE,	*	
	*	
Plaintiff,	*	
	*	
V.	*	CA 75-5033-T
	*	
BASF WYANDOTTE AND NATIONAL GYPSUM COMPANY,	*	
	*	
Defendants	*	

MEMORANDUM

TAURO, D.J. August 31, 1983

Plaintiff, Dr. Leslie C. Case, has sued the defendants, BASF Wyandotte (BASF) and the National Gypsum Company for patent infringement and has sued BASF for alleged antitrust violations. Case charges that a number of specific claims found in his patent, United States Patent 3,483,169 (169 patent), have been directly infringed by BASF, and that claims in his patent, United States

Patent 3,502,601 (601 patent), have been contributorily infringed by BASF. He further charges National Gypsum with direct and contributory infringement of claims under the 601 patent. In addition, he avers that BASF, in violation of antitrust laws, conspired with National Gypsum and sold its infringing products to National Gypsum at lower than market prices, thereby injuring Case.

A six day bench trial was held on this matter. The issues of liability and damages were bifurcated. Presently before the court is the question of whether plaintiff has proven liability on the part of defendants.

I.

A. The 169 patent describes copolymers having both ester and ether linkages in substantial quantity and in

substantially random distribution within the polymer chains, with the ether linkages occurring in sequences of varying length.[1] These copolymers are claimed to have a lower viscosity than those that had been previously invented. This lower viscosity made these copolymers or polyols easier to pour and process than previously invented polyols.

According to Case, the 169 patent also describes and claims a novel process for the production of the copolymer products of the 169 patent. The process requires the reaction of a cyclic anhydride, an epoxide, and a "starter" under specific conditions which include the absence of a strongly basic compound. In addition, Case asserts that a number

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[1] U.S. Patent 3,483,169 (169 Patent) (Plaintiff's Exhibit 1a) Column 2, lines 25-32.

of applications of the 169 patent are possible including the creation of rigid urethane foams, flexible urethane foams, flexible urethane polyols, unsaturated polyester resins, alkyds for paints and similar resins, plasticizers for polyvinyl chloride, ternary polymers, epoxy curing agents, and water-soluble furniture and floor polishers.

B. The 601 patent relates to the use of polyols prepared by the processes described in the 169 patent, to make specific rigid polyurethane foams. The 601 patent claims are "product by process" claims and correspond closely to the process claims of the 169 patent. Case claims that certain non-obvious, desirable results can be obtained from the production of polyurethane foams by the use of the process described in the 169 patent. In particular, he introduced a

letter from the National Gypsum Company indicating that they found extremely good humid aging in a foam made from a 169 patent polyol.[2]

Defendants take a different view of the 601 patent. They assert that the patent does no more than describe a conventional method of creating a polyurethane foam from a reaction between a polyol and a polyisocyanate. In their view, the only distinguishing characteristic of the resulting polyurethane from the prior art is that it is prepared with Case's polyol.

II

Case has charged BASF and National Gypsum with appropriating the essence of his patents as well as with infringing specific claims in each patent.

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2 Transcript 5-128, 129.

In order to better define the essence of his patents, Case described them as:

> (1) a polyurethane polyol containing a substantial content of polyester segments or residues derived from halogenated cyclic anhydride, together with a substantial content of polyether segments or residues derived from an epoxide, and
>
> (2) rigid polyurethane foams prepared therefrom.[3]

According to Case, halogenated ester residues were used to provide flame retardancy in the polyurethane foam and the ether segments served to lower the viscosity of the underlying polyol.

More particularly, Case testified that a number of BASF's products specifically infringed his patents. He testified that PLURACOL Polyol 477, a

---

[3] Plaintiff's Proposed Findings of Fact, p.6.

BASF product infringes product claims 35 and 36 of the 169 patent as well as claims 23 through 27, 12, 14 and 48. In addition, by the doctrine of equivalence, claim 28 of that patent is infringed by Polyol 477. Case further testified that insofar as PLURACOL Polyol 529 is a blend of Polyol 477, and that Polyol 622 is a blend of Polyol 529, both Polyols 529 and 622 infringed the patent to the same degree as Polyol 477. Case also claimed that BASF component systems 601R and 602R infringe the 169 patent. Finally, he asserted that BASF Polyols 453, 463 and 441 all infringed claims 34 and 36 of the 169 patent, and claims 26 through 28 by the doctrine of equivalence.

As for the 601 patent, Case testified that claims 1, 2, 3, 10, 11,

12, 15 and 38 were infringed by Polyols 477, 441, 453 and 463.

III

BASF and National Gypsum deny infringing specific claims of Case's patents. They argue that Case's patents are obvious as compared to the prior art and, thus, unpatentable, and are rendered invalid by anticipation. Further, they take the position that in claiming infringement of the essence of his inventions, Case seeks to have the court ignore critical limitations placed on the patents by the Patent Office prior to their approval.

At trial, BASF attempted to support its position by demonstrating significant differences between its own products and the patents in suits.

Dr. John T. Patton, testifying as an expert on behalf of BASF, first provided a general description of the BASF process for making polyols. Patton pointed out that whereas the 169 patent is essentially a one-step process which creates copolymers with a random distribution of ester and ether segments, the BASF polyols are made in a multi-step process and have an ordered structure. PLURACOL Polyol 453, for example, was prepared by charging a reaction vessel with Polyol 180-S, tetrabromophthalic anhydride, tetrachlorophthalic anhydride and sodium acetate. The reaction vessel was heated to 80° Centigrade. At this stage of the process, most of the Polyol 180-S and anhydride reacted. Propylene oxide was then slowly and continuously added over a three hour

period in order to cap the acid end formed by the reaction between Polyol 180-S and the anhydride.

A. In addition to describing the general differences between its own products and processes and those of the patents in suit, BASF sought to show specific distinctions. BASF first explored the way in which the 169 patent dealt with the presence of strongly basic compounds in the reaction process. The 169 patent provides:

> To produce the instant copolymers it is also essential that strongly basic compounds be completely excluded. The reaction mixture should advisably contain less than a about a hundred, and preferably less than ten, and more preferably less than five parts per million by weight of strongly basic substances. . . .[4]

---

[4] 169 Patent Col. 4, lines 8-12.

The patent further indicates, and Case so acknowledged at trial, that the presence of any strongly basic catalyst in the process creates polyols with fewer ether groups, higher viscosity, and decreased flame retardance.

At trial, Case agreed that sodium acetate was an example of the sort of strongly basic catalyst which must be excluded under the terms of the 169 patent. He also testified on cross-examination that all claims in suit under patents 169 and 601 (with the exception of claim 39 in the 601 patent) require that the process for making polyols be carried out in the absence of a strongly basic catalyst.

By contrast, the BASF process for producing its polyols utilized a strongly basic compound, sodium acetate,

as a catalyst. Patton testified that in preparation of PLURACOL Polyol 453, 500 parts per million of sodium acetate remained as a catalyst in the chemical reaction after all the sulfuric acid in the tetrabromophthalic anhydride had been neutralized. In the making of PLURACOL Polyol 441 and 477, over 800 parts per million of sodium acetate remained to serve as a catalyst. These amounts are five to eight times greater than the maximum limits set by the 169 patent.

At trial, Case was unable to satisfactorily explain away the presence of sodium acetate in the BASF process. On re-direct examination, Case testified that if a strong base were used as a

catalyst in the preparation of PLURACOL Polyol 477 or 453, the effects would be minimal in terms of increased viscosity, compatability, and flame retardancy, "assuming it acts as a catalyst and doesn't do something else."[5] Still, in the BASF process, the sodium acetate does more than act as a catalyst. It is first used to neutralize the sulfuric acid in the tetrabromophthalic anhydride. Only after neutralizing the acid does it serve as a catalyst. In any event, Case's testimony did not explain the significant amount of sodium acetate present in the BASF process in contradistinction to the clear proscription against such compounds in the 169 patent.

B. BASF raised another distinction between the 169 patent and its own

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5 Tr. 3-115.

products. The 169 patent provides, and Case agreed at trial, that the polyols of the patent are produced by reacting together in "intimate admixture" the polymerization starter, the anhydride and the epoxide.[6] The term "intimate admixture" means that the reactants are mixed together so that they are actually in contact in solution. While the 169 patent provides that the reactants should all be combined initially, it also indicates that they may be added in "several sizable portions."[7] At the same time, the patent specifically warns against the addition of the epoxide in a series of small steps. "It should be clearly emphasized, however, that the copolymers of this invention cannot be produced, if

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6 Tr. 3-44.

7 169 Patent Col. 19 lines 35-36.

the polymerization is run under such conditions that the cyclic ether concentration is always low -- that is, if the epoxide is added dropwise to the reaction mixture -- . . . ."[8]

Here again, BASF's process for making its own polyols differs. The reactants were not added in intimate admixture during much of the copolymerization. Patton testified that as to PLURACOL Polyol 453, the epoxide, propylene oxide, was added in continuous or incremental fashion over a three-hour period. It was added after the polymerization starter had reacted with the anhydride. This continuous addition was employed in order to control the temperature of the reaction, and to minimize the formation of polyether segments.

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8 169 Patent Col. 3 lines 47-60.

The same process is used to produce PLURACOL Polyols 441 and 477.

In cross-examining Patton, Case pointed out that at certain points his patent did, in fact, contemplate continuous addition of reactants. He directed Patton's attention particularly to column 12 lines 39 through 42 and example 14 of the patent. These passages, however, do not lend support to Case's rebuttal argument. Column 19 of the patent seems to indicate that dropwise addition of epoxide results in the production of an essentially pure polyester with a "vanishingly small proportion of ether linkages present".[9] Further, in example 14 of the patent, reference is made to continuous addition of all the reactants, not just the epoxide.

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[9] 169 Patent Col. 19, lines 52-55.

In the BASF process, only the epoxide is added in a continuous manner.

The BASF process differs from the 169 patent's requirement of "intimate admixture" in another way. It is a multi-step process and, thus, not all of the reactants are in solution at the same time. For example, in making PLURACOL Polyol 477, pentaerythritol is used as a polymerization starter. But, as Case agreed at trial, contrary to the requirement of the 169 patent, the pentaerythritol starter was never in intimate admixture with the anhydride.[10]

C. There are three other specifications in the 169 patent which differ from the BASF products. These are the ratio of epoxide to anhydride combined in the copolymer chains (R/R'), the

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10 Tr. 3-45.

average degree of polymerization, and the length of ether segments between the anhydride and the last hydroxyl ("n"). Under claim 12 of the 169 patent (and claims 14 and 48 which refer to claim 12), the average degree of polymerization of ether segments must be at least 1.5. Claims 26 and 27 require "n" to be at least 1.5 and the average degree of polymerization also to be 1.5. Claims 28 and 33 require "n" to be 2. Claims 35, 36 and 52 require "n" to be at least 1.5 and R/R' be at leat 2.

Once again, these specifications provide a basis for distinguishing the BASF products from the patents in suit. In PLURACOL Polyol 453, the value of R/R' was a maximum of 1.15. The maximum value of "n" and the maximum value for the average degree of polymerization was 1.15. In PLURACOL Polyols 441 and

477, the values of R/R', "n", and the average degree of polymerization were all below 1.5.

D. Because the 601 patent utilizes the polyols described in the 169 patent, the 601 patent is distinguishable from the BASF products. Again unlike the claims of the 601 patent, BASF's polyols were not made in the absence of a strongly basic catalyst, nor were the polymerization starter, anhydride, and epoxide in intimate admixture during the reaction. Finally, Patton testified that the required copolymerization of 2 to 6 moles of epoxide per mole of anhydride did not occur in the BASF process.

V

Every element of a claim charged to be infringed must be found in the allegedly infringinging device, and

the omission of any one element precludes infringement. Graphicana Corp. v. Baia Corp., 472 F.2d 1202 (6th Cir. 1973); See Gaddis v. Calgon Corp., 506 F.2d 880 (5th Cir. 1975); Teledyne McCormick Selph v. U.S. 558 F.2d 1000 (Ct.Cl. 1977). A review of the evidence in this case reveals that some elements of the claims which Case charges have been infringed are not fuond in the BASF polyols. The patents in suit specifically provide that strongly basic compounds must be excluded from the process or, at least, not exceed 100 parts per million. The BASF polyols exceed these limitations several fold. Indeed, the presence of a strongly basic catalyst seems to be a central feature of the BASF process for making polyols.

Further, Case's patents call for intimate admixture of the reactants and addition of the epoxide immediately or in a small number of large batches. BASF has demonstrated that its own reactants are not intimately admixed. In fact, in the making of PLURACOL Polyol 477, the polymerization starter is never in contact with the anhydride. The BASF polyols are made by continuous dropwise addition of epoxide to the chemical reaction. Case's 169 patent specifically teaches against such incremental addition of epoxide (except in one specific example where all reactants are added on a continuous basis).

The patent claims in suit call for the values of R/R', "n", and the average degree of polymerization all to be at least 1.5. In the BASF polyols, none of these values are as great as

1.5, and many are as low as 1.15. Thus, not every element of the claims charged to be infringed is found in the BASF process, and the BASF process differs significantly from the patents in suit. The BASF products and processes do not literally infringe the patents in suit.

Case takes the position that even if the court finds that his patents are not literally infringed by BASF, the essence of the patents has been illegally appropriated and, by the doctrine of equivalence, BASF has committed infringement. Under that equitable doctrine, the test for equivalence requires only that the infringing product, "perform substantially the same work in substantially the same manner to achieve substantially the same result." Colortronic Reinhard & Co. v. Plastic Controls, 668 F.2d 1 (1st Cir. 1981) (citations

omitted). Case's patents, however, do not meet this test.

The differences between the patents in suit and BASF's products as noted above cannot be easily dismissed. In fact, Case represented to the Patent Office that some of these differences distinguished his invention from the prior art. First, Case used the requirement that strongly basic compounds be absent from his process to differentiate his invention from United States Patent 2,779,783 (the Hayes Patent) and United States Patent 3,254,060 (the Connolly Patent). Second, Case used the 169 patent's teaching about large batch addition of epoxide to distinguish his invention for United States Patent 3,089,863 (the Hicks Patent) which taught dropwise addition.

Case cannot claim that these distinctions are critical for the purposes of claiming non-obviousness over the prior art at the Patent Office, and then expect the court to ignore or minimize these differences by applying the doctrine of equivalence. "Claims that have been narrowed in order to obtain the issuance of a patent by distinguishing the prior art cannot be sustained to cover that which was previously by limitation eliminated from the patent." Graham v. John Deere Co., 383 U.S. 1, 33 (1966).[11] In short, BASF's products and processes do not perform substantially

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[11] If the court were to accept a very generalized description of the allegedly infringed claims under the doctrine of equivalence, it is quite likely that Case would be unable to overcome BASF's argument that the patents are invalid by reason of anticipation and obviousness as compared to the prior art.

the same function, in substantially the same manner to achieve substantially the same results as the patents in suit.

In view of these findings, the court holds that BASF Wyandotte has not infringed the 169 patent nor has it contributorily infringed the 601 patent. In addition, the court holds that National Gypsum Company has not directly or contributorily infringed the 601 patent. Case has simply failed to sustain his burden of proof as to any alleged infringement. In light of these holdings, the court need not pass on BASF's challenge to the validity of the patents.

VI

Case has also charged BASF with violating antitrust laws. Case alleges that BASF sold polyols to National Gypsum at an artificially re-

duced price and, thereby, prevented Case from supplying his polyols to National Gypsum. As an initial matter, there is a serious question as to whether Case has standing to assert such claims under § 4 of the Clayton Act, 15 U.S.C. § 15. At trial, Case acknowledged that he never signed a lease for a manufacturing facility, never had a reaction vessel suitable for producing commercial volumes of polyols and did not have other equipment necessary for manufacturing polyols such as vacuum pumps, liquid pumps, or liquid holding tanks. Nor did he make arrangements with the only supplier of tetrabromophthalic anhydride, Michigan Chemical, to obtain that chemical, necessary to his proposed manufacturing process.[12]

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12 Tr. 3-62-64.

Case, in sum, was totally unprepared to produce commercial quantities of his polyols. It is difficult to imagine, therefore, how Case could have been injured by any alleged antitrust violations engaged in by BASF. Still, under the broad reading of § 4 of the Clayton Act given by the Supreme Court in Blue Shield of Virginia v. McReady, 50 U.S.L.W. 4723 (June 21, 1982), this court is reluctant to find that Case's alleged injury is too remote or incidental from the alleged antitrust violation.

The evidence adduced at trial did not support Case's theory. Case did no more than show that varying companies paid varying prices for blended or unblended polyols. He purported to show that Witco Company paid more for a blended polyol than National Gypsum paid

for an unblended polyol in 1973. On cross-examination, however, Case conceded that the amount realized by BASF on a unit basis from the sale to National Gypsum exceeded the amount realized on the sale to Witco.[13]

Throughout his testimony, Case admitted that he was not certain of the exact meaning of the documents which reflected the prices of the polyols and even characterized part of his own testimony as an "educated guess."[14] Case repeatedly testified that certain price differentials looked suspicious to him. These suspicions and the rest of Case's highly speculative testimony were not reinforced by credible evidence. Case

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13 Tr. 3-91.

14 Tr. 3-88.

could show no conspiracy, price discrimination, or any intentional or unintentional antitrust violations by BASF or National Gypsum. The court finds that Case has not sustained his burden of proof on the charges of antitrust violations, and that he has failed to show that BASF either attempted to or actually engaged in monopolization in violation of § 2 of the Sherman Act.

An order will issue.

s/s _____
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LESLIE C. CASE,	*	
	*	
Plaintiff,	*	
	*	
V.	*	CA 75-5033-T
	*	
BASF WYANDOTTE AND NATIONAL GYPSUM COMPANY,	*	
	*	
Defendants	*	

ORDER

TAURO, D.J. August 31, 1983

For the reasons stated in a memorandum issued this date, judgment is hereby entered in favor of the defendants on all counts.

It is so ORDERED.

s/s _____
United States District Judge